**Appendix A**

In the Supreme Court of the State of Nevada

Nos. 5363 and 5364

The State of Nevada,
Appellant,

vs.

W. Marking Eddington and
J. MacArthur Wright,
Respondents.

Appeal from orders of the Second Judicial District Court, Washoe County, granting writs of habeas corpus;

John W. Barrett, Judge.

***The order in Case No. 5363 is affirmed, and the order in Case 5364 is reversed.***

Harvey Dickerson, Attorney General; Daniel R. Walsh, Deputy Attorney General; Carl F. Martillaro, Special Deputy Attorney General, of Carson City, for Appellant.

Morse and Graves, of Las Vegas, and Robert W. Hughes, of Salt Lake City, Utah,
for Respondent W. Mark Eddington

Vargas, Dillon, Bartlett and Dixon, of Reno,
for Respondent J. MacArthur Wright.

## OPINION

By the Court, Thompson, C.J.:

The issue presented by this consolidated appeal is the legal sufficiency of the evidence upon which a grand jury acted in returning two indictments charging embezzlement. One (Case No. 5363) alleged that Eddington and Frisby embezzled $100,000 from the People's Investment Company. The other (Case No. 5364) charges that Eddington, Wright, and Frisby embezzled $200,000 from the Mark Twain Life Insurance Company. Eddington and Wright challenged the sufficiency of the evidence through petitions for habeas corpus. **Shelby v. District Court,** 82 Nev. 204, 414 P.2d 942 (1966). Frisby did not interpose a challenge. The district court ruled that the evidence was not sufficient to warrant holding either defendant for trial and discharged each pursuant to his application for habeas corpus. We affirm that ruling in Case No. 5363, but reverse in Case No. 5364.

The quality and persuasive force of evidence needed to support an indictment are expressed by NRS 172.260(2) and NRS 172.280. The first commands that "none but legal evidence, * * * to the exclusion of hearsay or secondary evidence," shall be received. The second suggests that grand jurors should indict "when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

It is not useful to relate the mass of legal evidence presented to the grand jury. In the Mark Twain case there was ample to justify a belief that, absent explanation or contradiction, a trial jury could lawfully convict the defendants. Accordingly, we shall recite only an abbreviated version of the record simply to show that statutory standards were met. As to the People's Investment matter we shall briefly note wherein the showing was deficient.

People's and Mark Twain are domestic corporations. Each was chartered in 1963. The aim of Mark Twain was to qualify and do business as a stock life insurance company. People's was organized to conduct the sale of shares of stock in Mark Twain. In October, 1963 the two companies made an agreement giving People's authority to manage Mark Twain during the sale of the common stock to be offered by Mark Twain. Eddington was the vice-president and a director of Mark Twain, and the president and a director of People's. Wright was the secretary-treasurer, resident agent, director, and counsel for Mark Twain, and counsel for People's. Frisby was the president and a director of Mark Twain, and the secretary-treasurer and director of People's. Eddington and Frisby were a majority of the Board of Directors of People's and, with Wright, composed the "executive committee" of Mark Twain.

Enough of the common stock of Mark Twain was sold by October, 1964 to cause the State to issue Mark Twain a license to do business as a stock life insurance company. The function of People's under the

stock sales agreement had been discharged. A majority of the Board of Mark Twain believed that People's had ceased all operations.

Mark Twain commenced selling insurance in January, 1965. From then through September, 1965, more than $200,000 left its treasury without authority from the Board of Directors. Most of that amount was paid out as "insurance commissions" to People's ($107,000), and to Eddington ($34,421.22) and Frisby ($32,000), individually. The charter of People's did not grant it authority to solicit or sell insurance, nor was an agent's license issued to it for that purpose. Although the minutes of Mark Twain ambiguously reflect that its "executive committee" (Eddington, Wright, and Frisby) had approved an arrangement with People's, and with Eddington and Frisby individually, to sell Mark Twain insurance on a commission basis, the majority of the Board of Directors of Mark Twain assert that such arrangement was never presented to them for consideration and approval, and that the minutes prepared by Wright so indicating, are false. In any event, the record shows that the sums expended by Mark Twain for "insurance commissions" substantially exceed the percentages authorized by the committee, assuming its authority to act for Mark Twain. The record also shows payments totalling $15,000 to Wright as counsel fees, and almost $43,000 in "travel expense," each without approval of the Board. Indeed, the majority of the Board was kept in the dark about these expenditures. When they inquired, the members of the executive committee would engage in a filibuster and refuse to respond candidly. Even phys-

ical violence was threatened. The stability of Mark Twain deteriorated and the company was placed in receivership.

These facts justify the belief held by the grand jury that substantial funds of Mark Twain were fraudulently appropriated by Eddington, Frisby, and Wright. the Elements of embezzlement [ NRS 205.300 ] are present. A fiduciary relationship existed between Mark Twain and those charged with defalcations. Cf. Carter v. State, 79 Nev. 89, 378 P.2d 876 (1963). Money was used for purposes other than those for which entrusted thus permitting an inference of fraudulent intent. State v. Trolson, 21 Nev. 419, 32 P. 930 (1893). A prima facie case was made. Whether it will persuade at trial where the defendants will be present with counsel, and afforded an opportunity to explain their conduct, is another matter, wholly irrelevant to the issue at hand.

Although Eddington and Wright suggest that the grand jury should have heard from them before returning idictments, the grand jury was not required to do so. NRS 172.270. Indeed, had they been granted an audience, the grand jury would not have been required to accept their explanations, but could indict notwithstanding them. In this respect the grand jury function is not unlike that of the justice of the peace upon a preliminary examination. [ See State v. Fuchs, 78 Nec. 63, 368 P.2d 869 (1962), where we held that the evidence at the preliminary hearing was sufficient to justify holding the accused to answer in the district

court, notwithstanding her written exculpatory statement received in evidence. ]

The indictment charging embezzlement from People's Investment is not supported by sufficient evidence to warrant trial. Although the record reflects substantial expenditures without explanation, there is nothing to show that the expenditures were unauthorized. Of course, the money flow from Mark Twain to People's and out, may well be competent evidence at the trial of the Mark Twain case.

Other contentions respecting the two indictments have been considered and are without substance. The order of the district court granting habeas corpus in the Mark Twain Case No. 5364 is reversed, and the cause remanded to the district court for trial. The order granting habeas corpus in the People's Investment Case No. 5363 is affirmed.

Thompson, C.J.

We concur:

Collins, J.
Zenoff, J.

Filed September 25, 1967,
C. R. Davenport, Clerk.

**Appendix B**

In the Supreme Court of the State of Nevada

No. 5464

State of Nevada,

Petitioner,

vs.

Second Judicial District Court, State of Nevada, for the County of Washoe, the Honorable Thomas O. Craven, a District Judge thereof,

Respondent.

## PERMANENT WRIT OF PROHIBITION

The State of Nevada to the Second Judicial District Court and the Honorable Thomas O. Craven, District Judge thereof, greetings:

Where as, Harvey Dickerson, Attorney General of the State of Nevada, by and through Daniel R. Walsh, Chief Deputy Attorney General, Carl F. Martillaro, Special Deputy Attorney General, and John A. Porter, Deputy Attorney General, did, in our Supreme Court of the State of Nevada, present facts by verified petition that the Second Judicial District Court, Honorable Thomas O. Craven, Judge thereof, is about to hold hearings and decide matters already determined by this Court, and is exceeding the jurisdiction of said

court in doing so unless restrained and prohibited from doing so; and

Whereas, the Supreme Court of the State of Nevada did on the 8th day of November, 1967, hold a hearing in chambers on this matter, with the following counsel present: John C. Renshaw of Vargas, Bartlett and Dixon, attorneys for J. MacArthur Wright; Madison B. Graves, Esq., attorney for W. Mark Eddington; J. Rayner Kjeldsen, Esq., attorney for C. Larry Frisby; Daniel R. Walsh, Carl F. Martillaro, and John A. Porter; and

Whereas, it has been determined by this Court that the matters presented by the petition for writ of habeas corpus filed by J. MacArthur Wright and petition for writ of habeas corpus filed by W. Mark Eddington, joined in by defendant C. Larry Frisby, and the matters presented by a petition for stay filed by defendant W. Mark Eddington, have been previously presented to this Court and found to be without merit or substance; and

Whereas, the District Court is without jurisdiction to reconsider these matters previously disposed of by this Court,

It Is Hereby Ordered that the Second Judicial District Court, Honorable Thomas O. Craven, Judge thereof, be and is hereby prohibited, enjoined and restrained from considering or acting further on the petitions for habeas corpus presented by defendants J. MacArthur Wright, W. Mark Eddington and C. Larry Frisby and assigned Washoe County Civil Nos. 240497 and 240498.

It Is Further Ordered that the said Court and Judge be prohibited, enjoined and restrained from considering or acting further on a petition for stay filed by defendant W. Mark Eddington in Washoe County Criminal Case No. 233307.

It Is Further Ordered that the described petitions for habeas corpus and stay be and they hereby are dismissed.

It Is Further Ordered that counsel for each of the defendants notify this Court in writing by November 15, 1967, whether each and every defendant will or will not waive the sixty day rule for trial on the merits.

Done at Carson City, Nevada, this 8th day of November, 1967.

/s/ Thompson

Gordon Thompson, Chief Justice

/s/ Collins

Jon Collins, Justice

/s/ Zenoff

David Zenoff, Justice

Filed November 8, 1967.

C. R. Davenport, Clerk.

**Appendix C**

No. 23307 Dept. 2

IN THE SECOND UDICIAL DISTICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE APPLICATION
OF
W. MARK EDDINGTON FOR A WRIT OF HABEAS CORPUS

**PETITION FOR WRIT OF HABEAS CORPUS**

TO THE HONORABLE THOMAS CRAVEN, JUDGE OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, DEPARTMENT NO. 4 THEREOF:

COMES NOW, W. MARK EDDINGTON, acting by and through his counsel, MADISON B. GRAVES, ESQ. of MORSE & GRAVES and ROBERT W. HUGHES, ESQ. appearing and making this request, and petitions the above entitled Court for the issuance of a Writ of Habeas Corpus and as grounds therefor states:

I.

That he, the said W. Mark Eddington, is unlawfully restrained of his liberty by C. W. Young, Sheriff

of Washoe County, State of Nevada; that said restraint consists in this, that the said W. Mark Eddington has been required to appear before the above entitled Court and is currently released by said Court on $25,000.00 bail but with the requirement that he appear before the Court to plead to the Indictment pending against him on charges of embezzlement.

II.

That the said restraint of libery is illegal and that the illegality thereof consists in this, to-wit:

1. The indictment is predicated upon illegal evidence presented to the Grand Jury of Washoe County in violation of his constitutional rights of the United States of America.

2. The laws of Nevada under which he was indicted were unconstitutional and in violation of his constitutional rights of the United States of America.

3. The Grand Jury impaneled had at least one member who was biased and prejudiced and had a financial interest in the subject matter on which the indictment is predicated and the prosecutors who presented evidence to the Grand Jury were biased and prejudiced and failed and refused to furnish said Grand Jury with evidence in their possession which would exonerate him, which interests and actions are in violation of his constitutional rights as guaranteed by the constitution of the United States of America.

The constitutional rights of petitioner which have been violated are encompassed in the Fifth, Sixth

and Fourteenth Amendments of the United States Constitution.

WHEREFORE, your petitioner prays as follows:

1. That a Writ of Habeas Corpus be granted, directed to the said C. W. YOUNG, Sheriff of Washoe County as aforesaid, commanding him to have the body of the said W. MARK EDDINGTON before this Honorable Court at a time and place therein to be specified, to do and receive what shall then and there be considered by this Court, concerning said W. MARK EDDINGTON, together with the time and cause of his restraint, and said Writ; and that he, the said W. MARK EDDINGTON, may be restored to his liberty and an order be entered directing the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to dismiss the Indictment pending against him.

Dated this 2nd day of November, 1967.

MORSE and GRAVES

MADISON B. GRAVES

ROBERT W. HUGHES

By: Madison B. Graves

Attorneys for Petitioner
116 South Fourth Street
Las Vegas, Nevada

**Appendix D**

IN THE SUPREME COURT OF THE STATE OF NEVADA

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|---|---|
| THE STATE OF NEVADA,<br>Appellant,<br>vs.<br>W. MARK EDDINGTON and J. MACARTHUR WRIGHT,<br>Respondents. | No. 5364 |

RESPONDENT MARK EDDINGTON'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Comes now W. Mark Eddington, through his attorneys, Madison B. Graves of Morse and Graves, and Robert W. Hughes, and respectfully petitions this honorable Court for a rehearing of the above entitled case.

Mark Twain Life Insurance Company is hereafter referred to as "Mark Twain" and Peoples Investment Company is referred to as "Peoples".

This petition is based upon the following grounds:

**POINT I. THE COURT MUST CONSIDER AND RELATE THE MASS OF TESTIMONY PRESENTED TO THE GRAND JURY AND TO DISCERN WETHER IT WAS "NONE BUT LEGAL EVIDENCE" *** TO THE EXCLUSION OF HEARSAY OR SECONDARY EVIDENCE, AND WHETHER THE GRAND JURY PROPERLY INDICTED RESPONDENT "WHEN ALL THE EVIDENCE BEFORE THEM TAKEN TOGETHER IS SUCH AS, IN THEIR JUDGMENT WOULD, IF NOT**

EXPLAINED AND NOT CONTRADICTED WARRANT A CONVICTION BY THE TRIAL JURY (NRS 172.260 (2) and NRS 172.280).

PPOINT II. PEOPLES WAS NOT LIMITED IN ITS MANAGEMENT OF MARK TWAIN UNDER ITS AGREEMENT EXHIBIT G, UNTIL ONLY SUFFICIENT STOCK WAS SOLD TO THE PUBLIC TO PERMIT MARK TWAIN TO COMMENCE BUSINESS AS A LIFE INSURANCE COMPANY. IN FACT, EXHIBIT G CLEARLY EXPRESSED AN INTENT THAT PEOPLES SHOULD MANAGE MARK TWAIN UNTIL THE TERMINATION OF STOCK SALES WHICH OCCURRED ON JUNE 30 1965 (EX.S). PEOPLES HAD THE LEGAL RIGHT AND THE CORRESPONDING OBLIGATION TO MANAGE MARK TWAIN PURSUANT TO EXHIBIT G IN ALL FACETS OF ITS BUSINESS INCLUDING THE SALE OF LIFE INSURANCE. THIS RIGHT TERMINATED JUNE 30. 1965.

POINT III. A TRIAL JUDGE HAS A DUTY TO STRIKE AN INDICTMENT OR ISSUE A WRIT OF HABEAS CORPUS WHERE IT IS FOUNDED ON ILLEGAL EVIDENCE.

POINT IV. THE UNITED STATES CONSTITUTION AND THE NEVADA CONSTITUTION PROVISIONS FOR DUE PROCESS WERE VIOLATED IN THE MANNER EVIDENCE WAS PRESENTED TO THE GRAND JURY.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

### POINT I

THE COURT MUST CONSIDER AND RELATE THE MASS OF TESTIMONY PRESENTED TO THE GRAND JURY AND TO DISCERN WHETHERE IT WAS "NONE BUT LEGAL EVIDENCE" *** TO THE EXCLUSION OF HEARSAY

OR SECONDARY EVIDENCE, AND WHETHER THE GRAND JURY PROPERLY INDICTED RESPONDENT "WHEN ALL THE EVIDENCE BEFORE THEM TAKEN TOGETHER, IS SUCH AS, IN THEIR JUDGMENT WOULD, IF NOT EXPLAINED AND NOT CONTRADICTED, WARRANT A CONVICTION BY THE TRIAL JURY" (NRS 172.260(2) and NRS 172.280).

This court noted that it was "not useful to relate the mass of legal evidence presented to the Grand Jury". It is admitted that the Grand Jury transcript clearly discloses that a mass of evidence was presented to the Grand Jury, but very little of it was legal evidence. In fact, a reading of the Grand Jury transcript clearly demonstrates a total lack of regard to the statutory requirement "that hearsay and secondary evidence shall be excluded". Witnesses were admonished by counsel in such a manner as to incite and to raise a presumption of guilt on the part of the respondent without the witnesses giving any testimony. All of the evidence presented to the Grand Jury was either predicated upon leading questions, questions put to witnesses without proper qualification or foundation, answers based upon hearsay, conclusions furnished by witnesses who were not properly qualified, and a dirth of incompetent, irrelevant and immaterial evidence.

The following witnesses total testimony was incompetent, irrelevant and immaterial: Hale B. Bennett, Lamar Wilson, William Norris, Donald Giard, John Riccobene, Jean S. Kean, Dennis Patheal, Lew Hardy, John White, and most of Russell M. Johns testimony.

Exhibit S, introduced through the testimony of Mr. Johns, constitutes an flagrant example of illegal evidence which was filled with damaging conclusions to respondent. Exhibit S's author was deceased and his conclusions preempted the function of both judge and jury. No supporting evidence was identified or testified about by Mr. Johns which would support the damaging conclusions contained in Exhibit S.

Particular reference is made to the lack of licensing theory encompassed in the conclusions of the author. The only legal evidence before the Grand Jury by the remaining witnesses not mentioned above, concerned matters not directly related to the crime of embezzlement. There was some testimony as to purported forgery, nonpayment of amounts due salesmen, and other general testimony as to the method and mode of operation of the subject company which did not support the purported claim of embezzlement.

## POINT II

**PEOPLES WAS NOT LIMITED IN ITS MANAGEMENT OF MARK TWAIN UNDER ITS AGREEMENT EXHIBIT G, UNTIL ONLY SUFFICIENT STOCK WAS SOLD TO THE PUBLIC TO PERMIT MARK TWAIN TO COMMENCE ITS BUSINESS AS A LIFE INSURANCE COMPANY. IN FACT, EXHIBIT G CLEARLY EXPRESSED AN INTENT THAT PEOPLES SHOULD MANAGE MARK TWAIN UNTIL THE TERMINATION OF STOCK SALES WHICH OCCURRED ON JUNE 30, 1965 (EX. S). PEOPLES HAD THE LEGAL RIGHT AND THE CORRESPONDING OBLIGATION TO MANAGE MARK TWAIN PURSUANT TO EXHIBIT G IN ALL FACETS OF ITS BUSINESS INCLUDING THE SALE OF LIFE INSUR-**

ANCE. THIS RIGHT TERMINATED JUNE 30, 1965.

The author of Exhibit S included at page 54 the agreement between Peoples and Mark Twain, but he failed to include the subject agreement as contained in Exhibit G which was on file in the Insurance Commissioner's office and which provided for the Insurance Commissioner's approval of the contractural arrangement between the subject corporations and for the total management of Mark Twain by Peoples. Exhibit S is the only evidence in the Grand Jury transcript upon which a purported breach of trust could be predicated. No witness independently testified to the unlawful conclusions contained in Exhibit S. Exhibit G, was in fact approved by Insurance Commissioner Hammel. This contract permitted the management of Mark Twain by Peoples until 84,500 shares of Mark Twain's stock was sold. Commissioner Hammel issued the charter or license of Mark Twain in 1964 while Peoples was actively engaged in selling Mark Twain stock. The act of issuing the charter to permit Mark Twain to sell life insurance is approval by the Commisisoner of insurance of Peoples managing Mark Twain's sale of insurance. In support of this position, one need only look to Exhibit G where Insurance Commissioner Hammel required that someone other than Peoples be permitted to act as a general agent. Directors Luster and Riccabene were the only directors appearing before the Grand Jury, and they cannot explain away their conduct or lack of knowledge, or testify concerning the management of the corporation when such was a matter of public

record. Directors Luster and Riccabene had the responsibility to know what documents pertaining to the company were on file in the Insurance Commissioner's office as a matter of law. This Court found that a majority of directors appeared before the Grand Jury and did not know of the contractual arrangement between Peoples and Mark Twain, or facts concerning the management of the corporation. This conclusion is not warranted by the record in this matter. There were only four directors of Mark Twain, namely: W. Mark Eddington, Vaughan Cannon, Henry Luster, and John Riccabene. See the order of District Court Judge Richard L. Waters, Jr. in Case No. 26113, **Mark Twain Life Insurance Company, et al v. Vaughn M. Cannon et al.**

Exhibit G is clear on the point that Peoples had a right to manage Mark Twain or direct the stock offering period of Mark Twain which expired on June 30, 1965. There is no other evidence in the Grand Jury record contrary to this statement. Exhibit G, if it would not permit the continued management by Peoples on behalf of Mark Twain after June 30, 1965, at least was a contract approved by the Insurance Commissioner, contracted with Mark Twain to act as a general agent.

## POINT III

### A TRIAL JUDGE HAS A DUTY TO STRIKE AN INDICTMENT OR ISSUE A WRIT OF HABEAS CORPUS WHERE IT IS FOUNDED ON ILLEGAL EVIDENCE.

District Court Judge Barrett was correct in granting a Writ of Habeas Corpus for respondent Eddington.

In fact, he had a duty to so do when he learned independently from the grand jurors themselves that they received illegal evidence. The courts of Nevada, apparently, have not had occasion to consider a situation where one indicted charged that he was indicted on illegal evidence for one hundred two years. In **State v. Logan,** 1 Nev. 509, a county tax collector was charged with embezzlement. His attorney raised the question of illegal evidence being presented to the Grand Jury and requested that the indictment be stricken. The District Court permitted a hearing and granted the motion. This Court set the precedent aside where the grand jurors were required to testify concerning the evidence they received in the grand jury room. But this Court clearly observed that where illegal evidence was presented and could be determined from an independent source, that it would be proper to set aside such an indictment founded on illegal evidence and presumably, as in this case, to issue a Writ of Habeas Corpus.

Grand Jury can receive none but legal evidence. See **Underhill's Criminal Evidence,** Volume 1, Section 76, 28 LRA 318-320. The inclusion of illegal evidence by the prosecution before the grand jury requires that the indictment be set aside or a Writ of Habeas Corpus issued.

## POINT IV

## THE UNITED STATES CONSTITUTION AND THE NEVADA CONSTITUTION PROVISIONS FOR DUE PROCESS WERE VIOLATED IN THE MANNER EVIDENCE WAS PRESENTED TO THE GRAND JURY.

Due process simply means fair play at all stages of a criminal prosecution. The State of Nevada, in electing to proceed by a grand jury indictment, took upon itself the obligation to present all evidence in its possession to the Grand Jury. The prosecution had the obligation to present all evidence, even though helpful to the accused. **State v. Smith.** 74 NY S 2d 524. The safeguards of the Fourteenth Amendment of the United States Constitution have been violated in the proceeding before the Grand Jury and respondent's constitutional rights require affirmance of the Order of the District Court of Washoe County.

## CONCLUSION

If substantial illegal evidence is received by a Grand Jury, and an indictment could not issue except by the inclusion of the illegal evidence to form the elements of the crime charged, then the illegal evidence colors the entire Grand Jury proceedings, and such an indictment should be quashed, or a Writ of Habeas Corpus issue.

The Order of the Honorable John W. Bartlett of the Second Judicial District Court should be affirmed.

Respectfully submitted,

MADISON B. GRAVES
MORSE & GRAVES
ROBERT W. HUGHES
By /s/ Robert W. HUGHES
ROBERT W. HUGHES

## Appendix E

Western Union Telegram

352P PST NOV 6 67 PRA370

PR CYAQ35 RX DCARSON CITY NEV 6 336P PDT

ROBERT W HUGHES ESQ

9 EXCHANGE PLACE SUITE 707 SALT LAKE CITY UTAH

THE STATE IS GOING TO SEEK A WRIT OF PROHIBITION AGAINST THE SECOND JUDICIAL DISTRICT COURT, PROHIBITING IT FROM PROCEEDING FURTHER ON THE WRITS FILED AND JOINED IN BY THE DEFENDANTS IN THE MARK TWAIN CASE. PLEASE APPEAR BEFORE THE NEVADA SUPREME COURT AT 10 AM · WEDNESDAY NOVEMBER 8, 1967, AT WHICH TIME THE STATE WILL SEEK ITS ALTERNATIVE WRIT

HARVEY DICKERSON ATTORNEY GENERAL

10AM 8 1967
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